

105/114 6-27-91
RECEIVED

JUN 24 1991

BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Application of

THE FIDELIO GROUP, INC.

For A Construction Permit for a New
FM Station on Channel 282B (104.3 MHz)
New York, NY

File No. BPH-910502MQ

To: Chief, Mass Media Bureau

REPLY TO OPPOSITION
TO REQUEST FOR RETURN OF APPLICATION
AS UNACCEPTABLE FOR FILING

GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, New York, by its attorneys and pursuant to Sections 1.4 and 1.45(a) of the Commission's Rules, hereby submits its Reply to The Fidelio Group, Inc.'s ("Fidelio") Opposition to Request for Return of Application as Unacceptable for Filing ("Opposition"). In support whereof, GAF shows as follows:

I. FIDELIO'S OPPOSITION MUST BE DISMISSED AS UNTIMELY

Fidelio filed its competing application for the frequency currently licensed to GAF one day after the deadline set by the Commission's Rules. See 47 C.F.R. §73.3516(e); GAF Request for Return of Application as Unacceptable for Filing ("Request"). Fidelio's Opposition was just as untimely as its application.

GAF's Request was filed with the Commission on May 30, 1991. Under Section 1.45(b) of the Commission's Rules, Fidelio had ten (10) days in which to respond. Pursuant to Section

1.4(c) of the Rules, the first day to be counted in calculating this ten day period was the day after GAF's pleading was filed - May 31, 1991. Thus, the last day of this ten day "filing period" was Sunday, June 9, 1991. However, because GAF's pleading was served on Fidelio by mail, the actual "filing date" was extended three days, to June 12, 1991, pursuant to Section 1.4(h) of the Rules.^{1/}

Fidelio's Opposition was not filed until June 13, 1991. Inasmuch as Fidelio has not asked for a waiver of Sections 1.45 and 1.4 of the Rules, or otherwise even attempted to justify its late filing, its Opposition should be summarily rejected by the FCC as untimely.

^{1/} The term "filing period" is defined in Section 1.4(e)(3) of the Rules as "the number of days allowed or prescribed by statute, rule, order, notice or other Commission action for filing any document with the Commission. It does not include any additional days allowed for filing any document pursuant to (g), (h) and (j) of this section." As noted above, Section 1.4(h) provides for an additional three days where the filing period is ten days or less, and the document is served by mail. Section 1.4(j) provides that a document may be filed on the next business day of the Commission, if the "filing date" falls on a holiday (under Section 1.4(e)(1) the term "holiday" includes Saturday, Sunday and officially recognized federal legal holidays). The term "filing date" is defined in Section 1.4(e)(4) as "the date upon which a document must be filed after all computations of time authorized by this section have been made." In short, while the "filing date" cannot fall on a holiday, the final day of the "filing period," which is determined without taking into consideration the additional days allowed by Sections 1.4(h) and (j), may fall on a holiday, as in the case of Fidelio's opposition period. Therefore, the first day to be counted in calculating the three additional days to which Fidelio was entitled as a result of GAF's pleading having been served by mail was Monday, June 10, 1991, and the deadline was thus June 12.

II. FIDELIO'S APPLICATION WAS UNTIMELY
UNDER THE FCC'S RULES AND MUST BE
DISMISSED

If submitted, that copy could be used as evidence of timely submission in the event the official copy was lost or delayed. To establish timely filing, the MO&O required the back-up copy of the "time-critical" application to be filed with the Secretary's office by close of business on the official deadline date, accompanied by a receipt from an express carrier or commercial courier service indicating that the original application had been put in the hands of the courier in sufficient time to expect delivery to Pittsburgh before midnight on the next business day. Id. The one day grace period established in the MO&O thus applies: (1) only to "time-critical" broadcast and common carrier applications which previously were filed in Washington, DC, and (2) only when back-up copies of such applications are timely filed with the Secretary's office, along with proof of delivery to a next-day courier. Fidelio's application satisfies neither of these requirements.

A. Fidelio's Application Does Not Qualify
For The Grace Period Procedure

In the MO&O, the Commission defined "time-critical" applications as those filed "in response to a 'window' or a 'cut-off' list established by the Commission." MO&O, 67 RR 2d at 876. The Commission offered as examples "FM windows, the nationwide paging window, AM cut-off lists, and TV cut-off lists . . ." Id. at n.13.^{3/}

^{3/} Fidelio asserts that "time critical" applications.

The Fidelio application was not filed in response to a special "window" or "cut-off list" released by the Commission. Such lists are published on an irregular basis by the FCC and

people contacted applicants with a brief and finite period to

In any event, for Fidelio's argument to be correct, the Commission would have had to modify Section 73.3516 to change the deadline for competing renewal applications, without following notice and comment procedures and without even alluding to its decision to make this change. The Commission, of course, did no such thing. Fidelio simply missed the May 1 filing deadline.^{4/}

B. Fidelio Failed To Follow
The Required Filing Procedures

Fidelio's application was not entitled to a one day grace period for the additional reason that Fidelio completely ignored the back-up filing procedures required in the MO&O. As noted above, in order to qualify for the one-day grace period under the MO&O, Fidelio was required to file a back-up copy of its application with the Secretary's office in Washington, DC on May 1, 1991, the "official" cut-off date, along with proof that the application had been given to a courier service for next day delivery. MO&O, 67 RR 2d at 877. Fidelio explicitly acknowledges that no back-up application was ever filed with the Secretary's office. Opposition at 4, fn.6. Thus, having failed to meet the procedural requirements set forth in the

^{4/} While Fidelio now seeks to rationalize its late filing by suggesting it had a principled basis for waiting an extra day, the facts indicate that Fidelio simply did not have its application ready in time to meet the long-known May 1 deadline. Indeed, Fidelio's president, who resides in New York, did not sign the filing fee check until May 1, ~~and the entire engineering section of Fidelio's application~~

proof that the application was ready for filing on the official filing date.

In this regard, it is significant that the FCC stated in both the MO&O and the Public Notice that it was applying a "mail box rule" to such time-critical applications. A "mail box rule" means simply that a document is deemed to have been served or received upon mailing. The requirement that a back-up copy of time-critical applications be timely filed with the Secretary's office allows the FCC to ensure that the application was mailed (and under the fiction of the mail box rule, received) on the official filing date, as required by existing FCC rules. Without the requirement of a timely back-up filing, applications (such as Fidelio's) could be sent to the Mellon Bank in Pittsburgh for same-day delivery the day after the official filing deadline.^{6/} This does not constitute application of the mail box rule, but rather a one day extension of all present filing and cut-off periods.

Fidelio reads the Public Notice to allow applicants to disregard the back-up filing rule, and simply "slip" all "official" deadlines and cut-off dates by one additional day. This interpretation is completely at odds with the clear and explicit procedures enunciated by the FCC in the MO&O, as well as long standing FCC rules and regulations regarding the filing deadlines for broadcast and common carrier applications. Had the FCC intended to adopt such a fundamental change in its

^{6/} In fact, a number of commercial services now provide same-day delivery to Pittsburgh.

renewal filing procedures, it would have been required to provide proper notice of the specific rules proposed to be changed, and in particular that it was proposing to change Section 73.3516(e) of its rules, as well as an adequate explanation and reasoned analysis of its departure from the procedures set out in the MOFO. This the Commission did not

Code of Federal Regulations, or the plain language of an FCC
decision published in the Federal Register. In view of the

CERTIFICATE OF SERVICE

I, Brenda A. Todd, a secretary with the law firm of Fleischman and Walsh, P.C., certify that on the 24th day of June, 1991, the foregoing "Reply To Opposition To Request For Return Of Application As Unacceptable For Filing" was sent via postage prepaid, U.S. first-class mail, to the following:


Mace J. Rosenstein, Esq.
Hogan & Hartson
Columbia Square
555 13th Street, N.W.
Washington, DC 20004
Counsel for The Fidelio Group, Inc.

Morton L. Berfield, Esq.
Cohen and Berfield, P.C.
Board of Trade Building
1129 20th Street, N.W.
Washington, DC 20036
Counsel for Class Entertainment and
Communications, L.P.

Stuart B. Bedell, Esq.*
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, DC 20554

Roy J. Stewart, Esq.*
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, DC 20554

Robert L. Pettit, Esq.*
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, DC 20554



Brenda A. Todd

*Hand Delivery